



December 11, 2019

Board of Directors  
Metropolitan Transportation Authority

VIA EMAIL

**Re: MTA Board Must Revise MTA Ethics Policy and Ensure Greater Transparency of Recusals Stemming from Conflicts of Interest**

Dear MTA Board Directors,

We write to ask that you update the MTA's Codes of Ethics to reflect best practices and address public concerns regarding conflicts of interest to instill greater public confidence in the actions of the MTA Board. Specifically we ask that you:

1. **Meet as planned prior to the end of 2019 to review and approve revisions to the MTA Codes of Ethics**, as stated in the Governance Committee's 2019 work plan.
2. **Adopt the recommendations sent in July 2018 by Reinvent Albany, Citizens Union, Common Cause/NY, the League of Women Voters of New York City, and the NYPIRG Straphangers Campaign** regarding specific amendments to the MTA All-Agency and Board Codes of Ethics.
3. **Follow best practices regarding transparency of Board votes to:**
  - a. **document reasons for all recusals in Board meeting minutes**, as recommended by the Authorities Budget Office.
  - b. **create a public database of Board actions, including recusals.**

***July 2018 Ethics Recommendations***

In the year and a half since we sent the July 2018 joint letter, the MTA Board has not formally reviewed or voted on updates to its ethics policy, as it deferred consideration of its ethics policy at the December 2018 and March 2019 meetings of its Governance Committee. The letter specifically asked the MTA Board to:

1. Affirm by board vote that the Chairman/CEO is the head of the agency - whether or not receiving a salary - and is subject to all Public Authorities Law, Public Officers Law (Sections 73, 73-a and 74) and MTA internal ethics policies requirements covering heads of agencies, not just per diem board members. The legal responsibilities of the position cannot be delegated away, even if tasks are.
2. Amend the Board Code of Ethics to require notification to the full MTA Board of any board member's and the Chairman/CEO's potential conflicts of interest, including keeping a public record of discussions and determinations via meeting minutes, as recommended by the Authorities Budget Office.
3. Amend the Board Code of Ethics to ban outside income for the MTA Chairman/CEO - whether compensated or not - and at a minimum, appointed, non-civil service staff.
4. Post on the MTA's website the list of "prohibited sources" for gifts as defined in the MTA Codes of Ethics.
5. Amend the All-Agency and Board Codes of Ethics to eliminate double standards between board and/or management and employees regarding accepting directorships and attendance at prohibited-source sponsored events.
6. Conduct an internal review to consider revisions to the MTA's code of ethics as relates to the "revolving door" or post-employment restrictions for MTA staff accepting positions with those who do business with the MTA.
7. Affirm by board vote that campaign contributions to the governor from MTA board members are banned, as stipulated in the MTA Board Code of Ethics.
8. Amend the Board Code of Ethics to ban campaign contributions to the governor from board members' businesses and family.

In addition to the recommendations in the July 2018 letter, we believe that those with recurring business or others conflicts before state bodies should be barred from serving as board members rather than use of the current "disclose and recuse" regime to handle conflicts. Absent a change to either: (1) state law, (2) Joint Commission on Public Ethics regulations or (3) the MTA Board amending its Code of Ethics<sup>1</sup> to bar members from serving who have conflicts, there are changes that should be made to MTA practices to ensure greater transparency of conflicts of interest, as noted in recommendation #2.

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<sup>1</sup> Note that the Board is empowered to go beyond the restrictions in state law. See JCOPE Regulations, Title 19 NYCCR Part 932.10, Agencies Permitted More Restrictive Rules. <https://www.jcope.ny.gov/sites/g/files/oe746/files/documents/2017/10/19-nyccr-part-932-outside-activity-regulations-and-approval-procedures.pdf> and Public Officer Law Section 73(8)(d). <https://www.jcope.ny.gov/sites/g/files/oe746/files/documents/2017/09/public-officers-law-73.pdf>

## **Best Practices for “Disclose and Recuse”**

In its recommended practices for Public Authorities on Conflicts of Interest<sup>2</sup>, the Authorities Budget Office, states the following (emphasis added):

*Board members and employees of state and local public authorities owe a duty of loyalty and care to the authority and have a fiduciary responsibility to always serve the interests of the public authority above their own personal interests when conducting public business. As such, board members and employees have the responsibility to disclose any conflict of interest, including any situation that may be perceived as a conflict of interest, to the authority board and the public.*

It is important to note that the guidance specifies that conflicts of interest must not only be disclosed internally, but also to the public. ABO’s model Conflicts of Interest policy<sup>3</sup> provides the following procedures for public disclosure:

***Duty to Disclose:*** *All material facts related to the conflicts of interest (including the nature of the interest and information about the conflicting transaction) shall be disclosed in good faith and in writing to the Governance Committee and/or the Ethics Officer. Such written disclosure shall be made part of the official record of the proceedings of the authority.*

***Records of Conflicts of Interest:*** *The minutes of the authority’s meetings during which a perceived or actual conflict of interest is disclosed or discussed shall reflect the name of the interested person, the nature of the conflict, and a description of how the conflict was resolved.*

### **Current MTA Practice**

Currently, Section 4.05 the MTA Board Code of Ethics requires that members of the Board recuse themselves from both discussions and votes on matters “that give rise to the conflict of interest.” Recusal includes leaving the Board room “whenever practicable” until any discussion involving the matter has concluded. In practice, however, MTA Board members have typically not disclosed their intention to recuse themselves until the time of voting on matters, thus being present for discussions, and have not always stated the reason for any recusals.

Additionally, Board meeting minutes do not reflect best practices for disclosure of conflicts of interest as recommended by the ABO. Meeting minutes currently only list the names of Board members who have recused themselves and do not provide information about the nature of any conflicts that resulted in the recusal.

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<sup>2</sup> NYS Authorities Budget Office. Recommended Practice on Conflict of Interest Policy. Page 1. <https://www.abo.ny.gov/recommendedpractices/ConflictofInterestPolicy.pdf>

<sup>3</sup> NYS Authorities Budget Office. Recommended Practice on Conflict of Interest Policy. Pages 4-5

## ***Recommended Public Disclosure of Conflicts of Interest***

To meet the recommendations from the ABO and ensure full compliance with the MTA's current Ethics Policy:

1. MTA Board and Committee meeting minutes should state the name of the Board member, the nature of the conflict of interest, and note where recusals have taken place.
2. MTA Board members should recuse themselves when they have conflicts of interest from deliberations prior to their start and leave the Board room if necessary, rather than at the end of the deliberations when votes occur.
3. Abstentions should only be made for specific documented reasons, as Board members have a fiduciary duty to vote on matters unless there is a conflict of interest that would bar voting.

## ***Transparency of Board Actions***

Lastly, MTA Board materials have begun to summarize all actions for members, listing all procurements in a single list at the beginning of Board packets to aid members in reviewing actions for potential conflicts. Similarly, the MTA staff should provide a public tracker of all final Board actions on its website, including yes or no votes by members, and recusals or abstentions, including the reason for the recusal. This should show the following:

<b>Date</b>	<b>Body Meeting</b>	<b>Matter</b>	<b>Board Member(s)</b>	<b>Vote</b>	<b>Recusal</b>	<b>Nature of Conflict of Interest/Recusal</b>
11/14/2019	MTA Board	Procurement: project, company and contract number	Name	Yes No Abstain	Yes No	Specific detail about conflict - business interest, lobbying, etc.

Please contact me at [rachael@reinventalbany.org](mailto:rachael@reinventalbany.org) or 518-859-5307 should you wish to discuss this matter further.

Sincerely,

Rachael Fauss  
Senior Research Analyst

Cc. Jeff Pearlman, Director, Authorities Budget Office  
Lamond Kears, MTA Chief Compliance Officer